CALDERÓNSEGUIN
2751 PROSPERITY AVENUE SUITE 500
FAIRFAX, VA 22031
PHONE (703) 560-3500
FAX (703) 560-3600
WWW.CALDERONSEGUIN.COM

SUMMARY OF NOTICE OF PROPOSED RULEMAKING ON PROCEDURES FOR ASYLUM, WITHHOLDING OF REMOVAL, AND PROTECTION UNDER CAT

Prepared by Anam Rahman on 6/11/2020

COMMENTS DUE BY JULY 15, 2020

PROPOSED CHANGE: Amend the regulations so that noncitizens who establish a credible fear of persecution or torture AND noncitizens who establish are reasonable fear of persecution or torture are placed in "asylum-and-withholding-only" proceedings. Individuals in these proceedings would only be eligible for asylum, withholding, or CAT protection.

- **CURRENT FRAMEWORK**: Once a noncitizen demonstrates a credible fear of persecution or torture, the noncitizen is placed in section 240 removal proceedings, which provide greater procedural safeguards and administrative/judicial review. In section 240 proceedings, the noncitizen can proceed with an application for asylum and other relief for which s/he is eligible (ex. adjustment of status, VAWA cancellation, etc.).

PROPOSED CHANGE: Add language to the regulations to specify that an Immigration Judge must consider an apply all applicable legal precedent when reviewing a negative fear determination.

- **CURRENT FRAMEWORK**: Currently, the regulations merely state that IJs must consider the credibility of the noncitizen's statements and other facts of which the IJ is aware. Currently, in the credible fear context, the adjudicator must apply the most favorable interpretation of case law from all circuits.

PROPOSED CHANGE: Amend the regulations to raise the standard of proof in credible fear proceedings. The standard of proof in the credible fear process for statutory withholding of removal and protection under the CAT regulations would be raised from a "significant possibility" that the alien can establish eligibility for such relief or protection to a heightened "reasonable possibility."

- **CURRENT FRAMEWORK**: Individuals in credible fear proceedings must demonstrate a "significant" possibility that s/he could establish eligibility for asylum, withholding of removal, or protection under CAT. The "significant possibility" standard has been interpreted by DHS as requiring that the alien "demonstrate a substantial and realistic possibility of succeeding" in immigration court. The "reasonable possibility" standard is higher than the "significant possibility" standard.

PROPOSED CHANGE: Amend the regulations to allow asylum officers to consider internal relocation and mandatory bars to asylum/withholding in the credible fear process. If the officer determines that one of the mandatory bar applies, the noncitizen would receive a negative fear determination unless s/he can demonstrate a reasonable possibility of torture.

- **CURRENT FRAMEWORK:** Asylum officers cannot consider internal relocation or mandatory bars to asylum/withholding in the credible fear context. If the asylum officer believes a mandatory bar applies, the asylum officer must continue with the interview as if a bar did not apply and determine whether the noncitizen has demonstrated a credible fear of persecution or torture and, if so, refer the case to section 240 removal proceedings.

PROPOSED CHANGE: Expand the definition of a frivolous asylum claim by stating that to knowingly make a frivolous application for asylum, "knowingly" requires actual knowledge OR willful blindness; willful blindness means that the noncitizen was aware of a high probability that his/her application was frivolous and deliberately avoided learning otherwise. Also broadens the definition of "frivolous" to include applications that are "patently without merit or substance" and if applicable law clearly prohibits the grant of asylum (overruling *Matter of Y-L-*). Also amends regulations to allow asylum officers adjudicating affirmative asylum applications to make frivolous findings.

- **CURRENT FRAMEWORK:** Frivolous asylum determinations may only be made by an immigration judge or the Board of Immigration Appeals. The statute does not define "frivolous" but the regulations do and the definition is quite narrow; it is limited to deliberate fabrication of material elements.

PROPOSED CHANGE: Add a paragraph to the regulations to allow Immigration Judges to pretermit an deny an application for asylum, withholding, or CAT if the noncitizen has not established a *prima facie* claim for relief under the applicable laws and regulations. The IJ could pretermit in two circumstances: 1) upon motion by DHS; or 2) *sua sponte* on IJ's own authority. The noncitizen would have the opportunity to respond (at least ten days).

- **CURRENT FRAMEWORK:** In *Matter of Fefe*, the BIA stated that at a minimum, the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct. In addition, the regulations require a hearing on an asylum application to resolve factual issues in dispute.

PROPOSED CHANGE: Codify the particular social group requirements from *Matter of M-E-V-G-* and affirmed in *Matter of A-B-*, that a particular social group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct in the society in question AND that PSG must have existed independently of the alleged persecutory acts and cannot be defined exclusively by the alleged harm.

The proposed rule also identifies several non-exhaustive bases that would "generally be insufficient to establish a particular social group"—

1) past or present criminal activity or associations;
2) past or present terrorist activity or association;
3) past or present persecutory activity or association;
4) presence in a country with generalized violence or a high crime rate;
5) the attempted recruitment of the applicant by criminal, terrorist, or persecutory groups;
6) the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence;
7) interpersonal disputes of which governmental authorities were unaware or uninvolved;
8) private criminal acts of which governmental authorities were unaware or uninvolved;
9) status as an alien returning from the United States;

The proposed regulation would also codify *Matter of W-Y-C- and H-O-B-* and require a noncitizen define the proposed particular social group as part of the asylum application or in the record before the IJ or else waive any claim based on a PSG formulation not advanced. The noncitizen would also waive the ability to file any motion to reopen or reconsider an asylum application related to membership in a PSG that could have been brought at the prior hearing.

- **CURRENT FRAMEWORK:** The above mentioned PSGs are adjudicated on a case-by-case basis based on applicable legal precedent. Motions to reconsider and reopen are also adjudicated on a case-by-case basis based on the applicable statute, regulations, and case law. There are multiple precedential decisions across circuits that have affirmed cognizable PSGs in the nine contexts noted above.

PROPOSED CHANGE: Defines political opinion as one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof. The proposed rule states that the Attorney General will not favorably adjudicate claims of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state. Also states that political opinion is against a state or entity and not a "culture."

- **CURRENT FRAMEWORK:** Political opinion and imputed political opinion claims are adjudicated on a case-by-case basis. There is positive precedent on opposition to gangs qualifying as political and imputed political claims. *See e.g.*, *Hernandez-Chacon v. Barr*, 948 F.3d 94, 102–03 (2d Cir. 2020); *Alvarez-Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019).

Courts have also recognized gender-based asylum claims under the political and imputed political opinion grounds.

PROPOSED CHANGE: Add a paragraph to define persecution as an extreme concept of severe legal harm that does not include:

1) every instance of harm that arises generally out of civil, criminal, or military strife in a country;
2) any and all treatment that the United States regards as unfair, offensive, unjust, or even unlawful or unconstitutional;
3) intermittent harassment, including brief detentions;
4) repeated threats with no actions taken to carry out the threats;
5) non-severe economic harm or property damage; or
6) government laws or policies that are infrequently enforced, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.

- **CURRENT FRAMEWORK:** *Matter of Acosta* defines persecution is defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." 19 I&N Dec. at 222. This definition has been further refined by case law and requires a fact-specific inquiry. The Fourth Circuit in particular recognizes death threats alone as persecution.

PROPOSED CHANGE: Outline eight non-exhaustive situations where the adjudicator will not grant asylum or withholding because these circumstances will generally be insufficient to demonstrate persecution on account of a protected ground:

1) personal animus or retribution;
2) interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue;
3) generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state;
4) resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations;
5) the targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence;
6) criminal activity;
7) perceived, past or present, gang affiliation; and
8) gender.

The proposed rule would also bar consideration of evidence promoting cultural stereotypes of countries or individuals, including stereotypes related to race, religion, nationality, and gender, to the extent those stereotypes were offered in support of an alien's claim to show that a persecutor conformed to a cultural stereotype (ex. A-*R*-*C*-*G*-'s "broad charge" that Guatemala has a culture of machismo and family violence).

- **CURRENT FRAMEWORK:** An applicant for asylum or withholding must demonstrate that at least one central reason for his or her persecution or well-founded fear of persecution was on account of a protected ground: race, religion, nationality, membership in a particular social group, or political opinion. The "at least one central reason" standard has been refined and interpreted by case law and is highly fact-specific. There are no specifically identified situations or contexts where nexus would not be found.

PROPOSED CHANGE: Amend the regulations to "streamline" the relevant factors for internal relocation determinations. Also shift the burden to the applicant in private actor persecution cases to demonstrate by a preponderance of the evidence the internal relocation is not reasonable. This presumption would apply regardless of whether an applicant has established past persecution. The amendment would also provide "examples of the types of individuals or entities who are private actors."

- **CURRENT FRAMEWORK:** Where the persecutor is a government actor, it is presumed that relocation is not reasonable. Where the applicant has demonstrated past persecution, the government bears the burden of showing that reasonable and feasible internal relocation. If there is no past persecution, the applicant must demonstrate that there is no feasible internal relocation that is reasonable under all circumstances. The regulations also prescribe a non-exhaustive list of factors for adjudicators to consider in making internal relocation determinations.

PROPOSED CHANGE: Proposes three specific but non-exhaustive "significantly adverse" factors that adjudicators must consider when determining whether an applicant merits asylum as a matter of discretion:

(1) an alien's unlawful entry or unlawful attempted entry into the United States unless such entry or attempted entry was made in immediate flight from persecution or torture in a contiguous country;
(2) subject to certain exceptions, the failure of an alien to seek asylum or refugee protection in at least one country through which the alien transited before entering the United States; and
(3) an alien's use of fraudulent documents to enter the United States, unless the alien arrived in the United States by air, sea, or land directly from the applicant's home country without transiting through any other country.

The rule also proposes nine other adverse and significantly adverse factors that an adjudicator must consider in determining whether an applicant merits asylum as a matter of discretion. If one of these adverse factors applies, the adjudicator may favorable exercise discretion only if the applicant demonstrates by clear and convincing evidence that the denial of asylum would result in an exceptional and extremely unusual hardship to the alien.

(1) Staying for 14 days in any one country that permitted application for refugee, asylee, or similar protections prior to entering or arriving in the United States (same exceptions as Third Country Transit Rule – protection denied in foreign country, victim of severe form of human trafficking, country or countries not parties);
(2) Transit through more than one country prior to arrival in the United States (same exceptions as Third Country Transit Rule – protection denied in foreign country, victim of severe form of human trafficking, country or countries not parties);
(3) Criminal convictions that remain valid for immigration purposes despite a reversal, vacatur, expungement, or modification of conviction or sentence if the alteration is not related to a procedural or substantive defect in the underlying criminal proceedings;
(4) Unlawful presence of more than one year's cumulative duration prior to filing an application for asylum;
(5) Failure to file taxes or fulfill related obligations;
(6) Two or more prior asylum denials;
(7) Prior withdrawal with prejudice or abandonment of an asylum application;
(8) Failure to attend an asylum interview unless noncitizen can demonstrate by preponderance of the evidence exceptional circumstances or that interview notice was not mailed to last address or attorney's address; and
(9) Where a motion to reopen was filed and granted to seek asylum based on change in country conditions, failure to file a motion to reopen within one year of the change in country conditions;

- **CURRENT FRAMEWORK:** Asylum is a discretionary benefit. The BIA in *Matter of Pula* examined the sorts of factors immigration judges should consider when determining whether asylum applicants merit the relief of asylum as a matter of discretion. The BIA ultimately directed that that discretionary determination should be based on the totality of the circumstances. The BIA in *Pula* also stated that past persecution or a strong likelihood of well-founded persecution should generally outweigh all but the most egregious adverse factors.

PROPOSED CHANGE: Expand the firm resettlement bar to include three circumstances under which a noncitizen would be considered firmly resettled:

(1) the noncitizen either resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee, refugee, or similar status, but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States, regardless of whether the alien applied for or was offered such status
(2) the alien physically resided voluntarily, and without continuing to suffer persecution, in any one country for one year or more after departing his country of nationality or last habitual residence and prior to arrival in or entry into the United States; or
(3) (i) the alien is a citizen of a country other than the one where the alien alleges a fear of persecution and the alien was present in that country prior to arriving in the United States, or (ii) the alien was a citizen of a country other than the one where the alien alleges a fear of persecution, the alien was present in that country prior to arriving in the United States, and the alien renounced that citizenship prior to or after arriving in the United States.

The rule also proposes to specify that the firm resettlement bar applies "when the evidence of record indicates that the firm resettlement bar may apply," and puts the burden on the applicant to demonstrate that the firm resettlement bar does not apply. The rule also proposes that the firm resettlement of a parent or parents with whom a child was residing at the time shall be imputed to the child.

- **CURRENT FRAMEWORK:** Under *Matter of A-G-G-*, the officer bears the burden of presenting prima facie evidence of an offer or receipt of a permanent residency or citizenship. If there is prima facie evidence, the applicant must be given the opportunity to rebut such evidence. The adjudicator must weigh the totality of the evidence and make a determination whether the evidence of an offer or receipt of firm resettlement has been rebutted. If an officer finds the applicant was firmly resettled, the burden shifts to the applicant to establish that an exception applies.

PROPOSED CHANGE: Revise the regulations to state that (1) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under "color of law") and (2) that pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official not acting under color of law (i.e., a "rogue official") does not constitute a "pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," even if such actions cause pain and suffering that could rise to the severity of torture.

The rule also proposes to revise the definition of "acquiescence of a public official" in the regulations to state the "awareness" requires a finding of actual knowledge or willful blindness. The rule further proposes to define "willful blindness" as "the public official or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire."

The rule also proposes that acquiescence is not established by prior awareness of the activity alone but requires an omission of an act that the official had a duty to do and was able to do. The official or other person in question must have been charged with preventing the activity as part of his or her duties. In addition, such a person does not breach a legal duty to intervene if the person is unable to intervene, or if the person intervenes, but is nevertheless unable to prevent the activity

- **CURRENT FRAMEWORK:** The regulations do not provide guidance for determining what sorts of officials constitute "public officials." Circuit Courts have largely found that even rogue officials acting in violation of official police or his or her official status are still public officials for purposes of CAT.

PROPOSED CHANGE: Proposes to amend the regulations to state that, without needing to seek exercise of special discretion, the government may disclose all relevant and applicable information in or pertaining to the application for asylum, statutory withholding of removal, and protection under the CAT regulations as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien's immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.

- **CURRENT FRAMEWORK:** The regulations at 8 CFR 208.6 and 1208.6 govern the disclosure of information contained in or pertaining to an asylum application, credible fear records, and reasonable fear records. The nondisclosure provisions in 8 CFR 208.6(a)–(b) and 1208.6(a)–(b) cover "[i]nformation contained in or pertaining to any asylum application," records pertaining to any credible fear or reasonable fear determination, and other records kept by the Departments that indicate that a specific alien has applied for asylum or received a credible fear or reasonable fear interview or review thereof. The regulations prohibit disclosing protected information to unauthorized "third parties."

Link to notice of proposed rulemaking: https://protect2.fireeye.com/v1/url?k=80ed26a2-dc81cf62-80ea0247-0cc47adca7dc-ac8ab5c79be9a8e0&q=1&e=81044bcb-b3b8-47ba-8361-25a3778f47cc&u=https%3A%2F%2Fs3.amazonaws.com%2Fpublic-inspection.federalregister.gov%2F2020-12575.pdf%3Futm_medium%3Demail%26utm_source%3Dgovdelivery